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No. 85-842

# In the Supreme Court of the United States

**OCTOBER TERM, 1985**

CITY OF DES MOINES, IOWA, et al.,
*Petitioners,*

vs.

DENNIS A. MOORE, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals' affirmance of the district court's calculation of attorney's fees was erroneous when (a) the relief obtained was identical to the "essentially complete relief" of *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), recognized by this Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and by the legislative history of the Civil Rights Attorney's Fees Award Act as the benchmark for a fully compensatory lodestar fees award; and (b) the evidence as to both prevailing market rates and the reasonableness and necessity of the hours expended was uncontradicted.

2. As a question raised for the first time in this case, does *Marek v. Chesny*, ..... U.S. ....., 105 S.Ct. 3012 (1985), have any application to a class action pattern and practice case settled by Consent Decree and Stipulation prior to trial when (a) the Petitioners failed to make a valid offer of judgment under Rule 68; (b) the relief obtained by Respondents was more favorable than either of Petitioners' "offers"; and (c) the Revenue Sharing Act, an independent jurisdictional basis for al' the relief obtained, authorizes an award of "a reasonable attorney's fee" to the prevailing party but does not define fees as "costs" in the fee-shift statute.

3. Whether the court of appeals' affirmance of the district court's award of $15,237 in fees for legal services provided in the prosecution of Respondents' fee application, which resulted in a fees award of 96% of the requested merits lodestar, was error.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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### STATUTORY PROVISIONS INVOLVED

1. The State and Local Fiscal Assistance Act of 1972, as amended (Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1028), codified at 31 U.S.C. § 6721(c):

> In an action under this section, the court—
>
> * * *
>
> (2) to enforce compliance with section 6716(a) or (b) of this title, may allow a prevailing party (except the United States Government) a reasonable attorney's fee.

## STATEMENT

Petitions such as this, by losing defendants

> . . . must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988.

*Hensley v. Eckerhart,* 461 U.S. 424, 442 (1983) (Brennan, J., concurring in part and dissenting in part), quoted with approval in *Webb v. Board of Ed. of Dyer County, Tenn.,* ..... U.S. ....., 105 S.Ct. 1923, 1929 n.19 (1985). Appeals seeking to relitigate factual issues also waste valuable judicial resources. It was this latter concern, coupled with Petitioners' misconception of the appellate court's judicial review power in attorney's fees litigation, that caused the Eighth Circuit to exercise its supervisory authority in the instant case:

> Our concern centers on the large number of cases on our docket alleging an abuse of the district court's discretion which are based simply on the amount of an attorneys' fee award. Such appeals often lack substance and hinder the prompt disposition of more meritorious appeals. The dockets of all federal courts are overcrowded. We suggest to the bar and to individual counsel that as officers of the court, lawyers have a responsibility in limiting litigation over attorneys' fees.

* * *

> Appeal of the district court's fee determination should be taken only where the district court allegedly has misapplied the applicable law. Appeals contending that the district court abused its discretion in determining the amount awarded ordinarily do not require oral argument and will be decided without argument by a three-judge screening panel. If the court holds an appeal is frivolous and not brought in good faith, the court may properly exercise sanctions relating to costs and attorneys' fees.

*Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985). A.5-A.6.

**1. Litigation of the Merits.**

The Petitioners' mischaracterization of the factual record is too extensive to fully correct in this short brief. Petitioners have argued that this was a "relatively simple case which was overprepared," that they "urged" the filing of the suit, and that they embraced the affirmative hiring relief contained in the final decree, and that therefore Respondents' fees award should be modest because they obtained no "uncontested" relief. The view that the litigation was a "mutually cooperative effort" is a revisionist picture commonly painted by defendants in fees litigation, and commonly rejected by the courts which presided over the litigation. *See, Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *White v. City of Richmond*, 559 F. Supp. 127 (N.D. Cal. 1982), aff'd, 713 F.2d 458 (9th Cir. 1983). The district court which presided over the instant case expressly repudiated Petitioners' factual contentions, and concluded:

> "This case was difficult and complex civil rights class action litigation. It necessarily required the expen-

diture of a great deal of time by plaintiffs' lawyers, and under the circumstances of the case several lawyers were necessary." A.9.

The settlement of the instant case was the product of negotiations similar to the 11-month negotiations that resulted in a consent decree in *White, supra,* where the district court found that "counsel, in addition to their efforts to achieve settlement, were forced simultaneously to prepare their cases for trial, because despite conscientious and well-intentioned efforts on the part of the attorneys for both plaintiffs and defendants, settlement was far from assured." 559 F.Supp. at 130.

Petitioners would mislead the Court with the numerous allegations that "the City" sought to utilize the case to further the integration of the fire department. Cert. Pet. at 3. What the facts show is that "the City" did not speak with one voice. Respondents' counsel met with Petitioners' counsel in March 1982, and, even though Petitioners' counsel only had authority from the Civil Service Commission (CSC) (S.App. 233, 322),[1] Respondents offered to pursue negotiations toward a consent decree. (S.App. 222, 324-325) It became apparent that some of the 27 defendants were less interested in settlement than others, and that certain vital defendants, including city council members and the fire chief, had deep reservations about affirmative action hiring relief. Nonetheless, negotiations began early, and by January 5, 1983,

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1. Respondents have elected not to burden this Court with testimonial evidence from the evidentiary hearing. Therefore, Respondents will cite to the record from the district court's hearing on fees as presented to the court of appeals in an Appendix (App.) and a Supplemental Appendix (S.App.), when documentation of fact is appropriate. Respondents' Appendix to this Brief includes only the Stipulation of the Parties, and will be cited "Resp.A."

the attorneys had negotiated, with client consultation, a detailed consent decree. (Ex. 11, S.App. 85-126) Respondents thought that a settlement had been achieved, but Petitioners responded with a dramatically different and a wholly inadequate counteroffer on February 14, 1983. A.30-A.36; see notes 10 and 11 *infra*, and accompanying text. Petitioners broke off further negotiations.[2] (S.App. 240)

Facing a discovery deadline of April 30, 1983 (S.App. 384, 240), Respondents proceeded to prepare for trial. (S.App. 241) Only after discovery had been completed and the case was trial ready did the Petitioners return, at the behest of the Respondents to the bargaining table. (S.App. 241) The final Consent Decree is essentially the January 5, 1983 Decree, plus an "opt out" provision severing individual claims for separate trial, which Respondents had offered to Petitioners eight months earlier. (Ex. 12, S.App. 127-130) Near the conclusion of the negotiations, an internal disagreement arose within the Des Moines NAACP (S.App. 241-243), which caused Respondents' class counsel, Lovell and Biehler, to seek the assistance of NAACP General Counsel Atkins and local

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2. The most likely inference is that the various Petitioners were deeply divided as to the terms upon which they would agree to settlement. The City Council's ultimate approval of the Consent Decree on September 6, 1983, was only by a vote of 4 to 3. A.43. The Civil Service Commission did agree to entry of a Consent to Temporary Restraint in August 1982, which required *certification* of one black for each nonblack. Contrary to Petitioners' representation, Cert. Pet. at 6, this relief was not double that sought by Respondents, who sought a preliminary injunction requiring Petitioners to *hire* one black for every two nonblacks hired. Certification is a crucial first step, but it does not ensure hiring. Certification is solely within the authority of the CSC; hiring is within the authority of the City Council, Fire Chief, and City Manager, and they were not bound by the August 1982 order.

NAACP counsel Wright. (S.App. 244-246, 337-339) Atkins and one of his assistants, Ford, and Wright worked with Lovell and Biehler during the months of August through December, 1983, to negotiate a Stipulation of the Parties which provided additional remedial protection and resolved the conflict within the plaintiffs' class. (S.App. 246-250, 340-345, App. 80-83) After a fairness and adequacy hearing, the district court entered final judgment on the Consent Decree on January 31, 1984.

**2. Litigation of the Fees.**

Consent Decree ¶ 33 provides that counsel for Plaintiffs are entitled to reasonable attorneys' fees. A.81. Settlement discussions with Petitioners did not prove fruitful. The District Court Judge, Harold Vietor, held a 1-day evidentiary hearing on July 6, 1984. Plaintiffs had the evidentiary burden and met that burden with testimony from Respondents' counsel Lovell and Biehler and complex litigation experts Ivan Bodensteiner and George LaMarca, the deposition of NAACP counsel Atkins, and affidavits from eleven Des Moines attorneys as to prevailing market rates and affidavits from eight attorneys with expertise in civil rights litigation as to the excellence of the results obtained and the reasonableness and necessity of the hours expended. Petitioners' evidence consisted of testimony by Earl Roberts, City Solicitor in March 1982 but who resigned his position in June 1982 before this litigation began, as to one conversation between himself and Respondents' counsel Lovell wherein each agreed to begin the process of seeking to negotiate a consent decree, and testimony by Reg Sipfle, City Civil Service Administrator, that the CSC hoped the suit could be resolved by consent decree and didn't believe it could engage in affirmative

action unless ordered by court decree. Petitioners also submitted affidavits of three Des Moines attorneys stating hourly rates they believed sufficient to attract competent counsel, but notably silent as to Des Moines market rates. Neither of Petitioners' attorneys, Mickle or Riley, who were in charge of this litigation from start to finish, testified or submitted themselves to cross-examination, though the City retained outside counsel to present its case.

The District Court issued a memorandum and order, and after discussing the standards of *Hensley* and *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), and their application to this case, awarded Plaintiffs fees and expenses as follows: $167,794.50 as a merits lodestar sum (reflecting a 100-hour reduction) and $10,739.69 in expenses; no enhancement for contingency or quality; and $15,030 as the lodestar on the fees litigation and $1,869.40 in expenses. The total award was $195,433.59. A.15. The Eighth Circuit quoted with approval the following critical findings of the District Court:

> This case was difficult and complex civil rights class action litigation. It necessarily required the expenditure of a great deal of time by plaintiffs' lawyers, and under the circumstances of the case several lawyers were necessary. (Footnote omitted.)
>
> * * *
>
> Under all of the circumstances, involvement of each lawyer was reasonably necessary. Each not only played a vital role, but each performed ably. The result is a detailed consent decree that is a very professional work product reflecting a high level of skill in the field of complex civil rights litigation.
>
> * * *

> [With the exception of 100 hours] all of the time expended by all of plaintiffs' lawyers, although extensive, was reasonable * * *.
>
> * * *
>
> The experience and abilities of each [attorney] justify the hourly rate each seeks.

766 F.2d at 344-345; A.2-A.3. Judge Vietor noted that "[t]he time spent litigating the fees issue is regrettable" and offered "to reconsider the amount of fees allowed for litigating the fee issue" if the fees award for work on the merits was "not significantly greater than the City offered in fee settlement negotiations". A.11. The City remained silent.

After briefing and oral argument, the Court of Appeals held: "The district court in this case has demonstrated an excellent grasp of these issues and standards [in *Hensley* and *Blum*]", 766 F.2d at 345, A.4, and did not abuse its discretion. The court quoted verbatim the eight issues which Petitioners raised in their appeal, A.3-A.4, and pointed out that only one issue could be characterized as legal. That issue, involving some hours spent on two individual claims which were severed from the class settlement but which were relevant to the pattern and practice relief obtained, was disposed of in a short footnote. 766 F.2d at 345 n.2; A.4 n.2. In rejecting Petitioners' other arguments, the court emphasized that "[t]he factual resolution of attorneys' fees cases [is] 'peculiarly within the competence of the district courts.'" 766 F.2d at 345; A.4. Indeed, it was Petitioners' misconception of the role of appellate courts in attorney fees litigation that caused the court to invoke its supervisory authority and instruct that appellate courts will not engage in *de novo* reviews of district court factual determinations.

## REASONS WHY THE WRIT SHOULD BE DENIED

There are no substantial legal issues presented. The district court and the court of appeals correctly applied the fees standards developed by this Court in *Hensley* and *Blum*. The primary thrust of this Petition is a request for a *de novo* rehearing of the facts, a frivolous request which this Court, like the appeals court, should promptly decline.

1. Petitioners' first Reason for Granting Petition, and subsets 1(a-c),[3] essentially contends the district court abused its discretion in finding that Respondents achieved the excellent results which warranted a near lodestar fees award, and the court of appeals failed to subject the district court's findings to a *de novo* "vigilant scrutiny." Cert. Pet. at 11. Petitioners' Reason 1(d) presents the same insubstantial legal issue that warranted only a footnote from the court of appeals (a challenge to some time spent on two individual claims that directly related to plaintiffs' successful class claims).

Petitioners urge an argument that flies in the face of settled law, including the leading precedent from this Court. The legislative history of the Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988, was expressly interpreted by this Court in *Hensley*. In that decision, the Court designated *Davis v. County of Los Angeles*, *supra*, a case which is virtually identical to the instant case in

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3. Petitioners' reasons 1(a-c) are essentially Issues I, III, IV, V, and VII, which they raised in the court of appeals; reason 3 was Issue VI in the court of appeals. The Eighth Circuit accurately characterized each of these arguments as raising only factual issues. Reason 1(d) was Issue II in the court of appeals, the only legal ground raised there. Reason 2, of course, was never raised in either the district court or the court of appeals. See note 6, *infra*.

terms of facts and relief obtained, as one of three district court decisions "that 'correctly applied' the twelve [*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)] factors . . . including 'the amount involved and the results obtained' ". This Court held in *Hensley*:

> In Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), *the plaintiffs won an important judgment requiring the Los Angeles County Fire Department to undertake an affirmative action program for hiring minorities.* In awarding attorney's fees the District Court stated:
>
> > 'It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.' 8 E.P.D. ¶ 9444, at 5049.
>
> In each of these three cases [Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978), Swann v. Charlotte-Mecklenburg Bd. of Ed., 66 F.R.D. 483 (W.D.N.C. 1975), and *Davis v. County of Los Angeles*], *the plaintiffs obtained essentially complete relief.*

461 U.S. at 431 (emphasis added).

*Hensley* held that plaintiffs who obtain "essentially complete relief" are entitled to a full lodestar fees award without any reduction or downward adjustment. *Hensley* also held, citing *Davis,* that when excellent results have been obtained, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.* at 435. This latter holding confirms the correctness of the Eighth Circuit's resolution of the lone legal issue presented to it by Petitioners, and renewed by them here. Cert. Pet. at 19. The district court properly refused to eliminate hours spent on two individual claims which were inextricably intertwined factually and legally with the successful pattern and practice claim. The Eighth Circuit recognized that Judge Vietor's allowance of these hours was consistent with *Hensley's* recognition that many civil rights cases "will involve a common core of facts". *Id.* at 435. Contrary to Petitioners' assertions, the claims of Williams and Watson were not unsuccessful, rather they were unresolved; the Consent Decree, by assuring their claims were not precluded, afforded them significant relief. (S.App. 289-290, 368-369)

The relief obtained by Respondents *exceeds* the relief in *Davis.* The Consent Decree in the instant case provides affirmative action hiring relief identical to that in *Davis,* requiring that fifty percent of all hires be of qualified blacks until the black percentage of the Des Moines Fire Department equals the black general population percentage,[4] and individual and class remedies and injunctive re-

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4. The key finding by the district court in *Davis* for its conclusion that the litigation achieved "excellent results" stated:

> The class represented by plaintiff has received and is receiving substantial and significant benefits as a result of the commencement of this action and the final judgment herein, which provides that forty percent (40%) of all new firemen

(Continued on following page)

lief not contained in the *Davis* decree.[5] Nonetheless, Petitioners argue that the absence of any damages, back pay or a Revenue Sharing Funds cutoff in the Consent Decree precludes a finding that Respondents obtained excellent results. Cert. Pet. at 18. The plaintiffs in *Davis* lost on their disparate impact challenge to the city's 5'7" minimum height requirement and recovered no back pay or damages. *Davis v. County of Los Angeles,* 8 FEP Cases 239, 241 (C.D. Cal. 1973), aff'd in part, rev'd in part, 566 F.2d 1334 (9th Cir. 1977), vacated, 440 U.S. 625 (1979). As this Court held in *Hensley,* Congress recognized the reality that litigation can achieve excellent results without obtaining every conceivable remedy in the Complaint prayer. 461 U.S. at 435. Nowhere is this reality more obvious than

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Footnote continued—

hired at the County of Los Angeles Fire Department shall be black and Mexican-American until such time as the percentage of blacks and Mexican-Americans in the fire department work force is equal to the percentage of blacks and Mexican-Americans in the County of Los Angeles.

8 E.P.D. ¶ 9444, at 5048.

The Consent Decree in the instant case requires the City "to fill at least fifty percent (50%) of all vacancies with qualified black applicants until the departmental goal of a 6.8% black uniformed work force is met." ¶ 19. (Blacks comprise 6.8% of Des Moines' general population.) ¶ 4(a), A.51. Thus, the interim goal of 50% in the instant case is higher than the 40% goal in *Davis,* while the long-term goal of each decree is identical in that each requires that the interim hiring goals be followed until the minority percentage of the fire department's uniformed personnel equals the minority percentage of the community's general population.

5. The Des Moines Consent Decree contains the general, prophylactic provisions of the *Davis* decree, *Davis v. County of Los Angeles,* 7 E.P.D. ¶ 9088 (C.D. Cal. 1973), and also requires substantial modification of the firefighter application-selection process and provides for extensive individual and class relief. The Des Moines Decree enjoins the City to extend the application period to a minimum of six weeks (compared to two weeks in prior years when the "old boy" word-of-mouth scheme was

(Continued on following page)

in class action cases alleging a pattern and practice of discrimination, as in *Davis* and the instant case. The rare case in which plaintiffs win everything prayed for is undoubtedly the case which *Blum* would find warrants a quality enhancement of the market rate used to calculate the plaintiffs' lodestar.

Petitioners' challenge to the hourly rates awarded and the reasonableness of the hours approved was waived by their failure to submit any evidence to the District Court on these points. *Blum v. Stenson* held the defendant had "waived its right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity" because it "failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged . . ., or the facts asserted in the affidavits submitted

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**Footnote continued—**

used), ¶ 16, to maintain a record of persons expressing interest in firefighter jobs and to notify them in advance of an application period, and to engage in specified affirmative minority recruitment. ¶ 18. The Decree enjoins the City from use of the personality test except as a pass-fail device (prohibiting its use as a ranking device) and reserves the right to challenge even that limited use of the test should statistics reveal an adverse impact. ¶ 12. The Decree provides hiring relief (with retroactive seniority) for any applicant that would have qualified for certification in any pre-1982 year had the rankings been calculated with the personality test eliminated from the calculation as in 1982. ¶ 21a. The Decree contained relief for a nonapplicants class in the form of an opportunity to compete under the new selection process even though such person was now older than 32. ¶ 21b. Finally, the Decree provided every member of the Plaintiffs' class the opportunity to preserve his or her individual claim by opting out, ¶ 35, and, for those with pending EEOC charges, the opportunity to have an expedited trial of their claims. ¶ 22a.

Plaintiff Dennis Moore qualified pursuant to ¶ 21a and was hired with retroactive seniority to January 1981. Plaintiff Gregory Perry reapplied in 1982 and was hired pursuant to the Consent to Temporary Restraint Order Respondents secured in August 1982.

by respondents' counsel." 104 S.Ct. at 1545 n.5. There is not a scintilla of evidence in the record which would support a challenge to the reasonableness of the hours or the hourly rates awarded by the District Court.

In sum, it was the Petitioners who backed out of negotiations which appeared would bear fruit at a relatively early stage of the litigation. It was the Petitioners who flirted with settlement throughout, but only when Respondents were trial ready did Petitioners agree to settlement. "Most cases are eventually settled, without going to trial, but the tough ones are settled only after the combatants begin to see the 'whites of the eyes' of the opposition." *Willie M. v. Hunt,* 90 F.R.D. 601, 602 (W.D. N.C. 1981), aff'd, 681 F.2d 818 (4th Cir. 1982). Now, Petitioners do not want to pay for the hours it took to successfully litigate a complex class action. They do not want to pay prevailing market rates. They do not like the result which flows from the *Hensley-Blum* equation. However, they are bound by the law and by the facts.

This Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). This is particularly true in the instant case as the findings of fact made by the district court received the unanimous concurrence of the court of appeals.

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

*Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

2. Petitioners urge that the fees award in this case conflicts with this Court's ruling in *Marek v. Chesny, supra.* Cert. Pet. at 21. Petitioners' belated attempt to raise a Rule 68 defense is foreclosed by its failure to raise the issue in either the district court or the court of appeals. The first mention of Rule 68 in this litigation occurs in the Petition for Writ of Certiorari.[6] In any event, Petitioners clearly failed to make a valid Rule 68 offer of judgment, the final Consent Decree and Stipulation[7] obtained by Respondents was easily more favorable than either of the "offers" made by Petitioners, and the attorney's fee award was based not only on Title VII and § 1988, but also on a statute which does not define the fees award as costs (rendering *Marek* inapplicable).

Examination of the record shows that Petitioners never made a Rule 68 offer of judgment in the instant case, though they purported to make two settlement offers. Neither the February 14, 1983 consent judgment counteroffer, A.30, nor the September 7, 1983 tender of the consent decree approved by the city counsel, A.40, in any way indicate they were subject to Rule 68. Neither men-

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6. Petitioners' first mention of *Marek v. Chesny* did not come until August 2, 1985, in a letter to the Eighth Circuit requesting that *Marek* "be brought to the attention of the Court in its consideration of the petition for rehearing en banc." A.85. Petitioners' letter, which made no mention of Rule 68, was mailed over a month after the Eighth Circuit's June 25, 1985 decision and several weeks after Petitioners filed their petition for rehearing.

7. It is questionable whether Rule 68 has any application in a case settled *prior to trial* by consent decree. In the instant case the Consent Decree expressly provides that plaintiffs are entitled to reasonable attorney's fees, that plaintiffs' counsel do not waive their entitlement to fees, and makes no provision preserving any Rule 68 defense which might be available to defendants. A.81. *Marek* held that plaintiffs "who reject an offer more favorable than what is thereafter recovered *at trial* will not recover attorney's fees for services performed after the offer is rejected." 105 S.Ct. at 3018 (emphasis added).

tions Rule 68. Neither is characterized as an "Offer of Judgment." Neither specifies that it is limited to a 10-day period, within which Respondents must accept or be deemed to have rejected. Instead, the February 14 offer requests "that plaintiffs respond at least no later than one week beyond the close of depositions." A.29. The September tender is completely silent as to any time limitation and none was imposed.

These defects are no minor technicalities as they fully concealed Petitioners' purported intent that the offers were subject to Rule 68. The recipient of a Rule 68 offer is entitled to clear notice and strict compliance with the Rule due to the severe sanction imposed by Rule 68. In addition, the February 14 "offer" was patently defective in that it contained no evidence of authorization. Absent such authorization there is no Rule 68 offer.[8] Rule 68 expressly provides that an offeree, upon acceptance, "may then file the offer and notice of acceptance . . . and thereupon the clerk shall enter judgment."

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8. An "offer of judgment must be unconditional." Moore, 7 *Federal Practice* ¶ 68.04 (2d Ed. 1985); *see also*, Derfner & Wolf, *Court Awarded Attorney Fees*, ¶ 22.02, at 22-4.8 (1985). In contrast to Petitioners' tender of the consent decree *approved by the civil service commission, fire chief, city manager, and city counsel* on September 6, 1983, A.42-A.44, Petitioners' counsel's letter, dated February 14, 1983, attaches no evidence of authority demonstrating it is making a binding unconditional offer. See 1 *Fed. Proc. Forms, L.Ed.* § 1:1686 (1975) (affidavit of authority to make Rule 68 offer). The letter merely states "the various defendants . . . stand ready" to enter into the consent judgment. A.28. The consent judgment which accompanied the letter was not signed by Petitioners' counsel. A.36. Respondents specifically pointed out that Petitioners' counteroffer contained no evidence of authority in their letter rejecting the consent judgment. S.App. 144. That municipal counsel's representation that she has authority, even authority formally voted upon by the city council, is no assurance that the municipality will not renege on the settlement is surely the lesson of the recent Iowa Supreme Court decision in *Dillon v. City of Davenport*, 366 N.W.2d 918 (Ia. 1985).

There is uncertainty "whether Rule 68 applies at all in cases like this which involve complex injunctive remedies rather than easily compared dollar damages." *Garrity v. Sununu*, 752 F.2d 727, 731 (1st Cir. 1984).[9] Even assuming Rule 68 does apply to complex injunctive remedies, plaintiffs are entitled to reject offers whose material provisions are vague and ambiguous without risk of Rule 68 sanction: "The district court was entitled to construe ambiguities in the [defendants' Rule 68] offer against the offeror lest the offeree be pressured into accepting what later turned out to be an unfavorable offer." *Id.* at 733.

Petitioners' consent judgment not only was fatally vague and ambiguous, a point emphasized in Respondents' rejection letter of March 23, 1983 (Ex. 15, S.App. 141-144), it would have provided Respondents with dramatically less relief than they obtained in the final Consent Decree and Stipulation. Indeed, Petitioners' contention to the contrary can hardly be taken seriously, as they notably make no attempt at comparison. Cert. Pet. at 21-22. The final Decree, described by the district court

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9. There also is considerable doubt whether Rule 68 applies in class actions. *Marek* of course was a single plaintiff, private interest damages action. Rule 23(e) provides that a class action cannot be settled without approval by the district court, and that condition creates an irreconcilable conflict with Rule 68. "Rule 68 sets a nondiscretionary 10-day limit on the plaintiff's power of acceptance—a virtually impossible amount of time in many cases to consider the likely merits of complex claims of relief, give notice to class members, and secure the court's approval." *Marek, supra*, at 3030 n.49 (Brennan, dissent). Further, what if a Rule 68 offer is acceptable to the named plaintiffs but is disapproved by the court, and the final judgment is less favorable than the offer. "To impose liability for costs on the plaintiff in that case would be ludicrous, yet required by the literal terms of Rule 68." *Gay v. Waiters' & Dairy Lunchmen's Union*, 86 F.R.D. 500, 503 n.8 (N.D.Cal. 1980). Indeed, the Rule 23(e) requirement of judicial approval necessarily conditions the Rule 68 offer, yet a Rule 68 offer must be unconditional.

as "a very professional work product reflecting a high level of skill in the field of complex civil rights litigation", A.10, is far better in every area, both in terms of the substantive relief mandated and the procedural and prophylactic safeguards built into the Decree to ensure the substantive relief would actually be attained.

Throughout their Petition, Petitioners assert their willingness at all times to agree to affirmative action hiring relief, which is the reasoning behind their claim that no "uncontested" relief was obtained. Comparison of the affirmative action hiring provisions of the proposed consent judgment with those of the final Consent Decree demonstrates the superficiality of Petitioners' contention. Although the interim hiring goals of the two decrees are the same (one-for-one), the long-term mandate of the final Consent Decree is decidedly more favorable to the plaintiffs' class than that in the consent judgment. The final Decree will ensure that at least twenty-one qualified blacks will achieve permanent firefighter positions (in contrast to eight under the rejected proposal).[10] Measured

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10. Although ¶ 4-5 of Petitioners' consent judgment (CJ) mandates one-for-one affirmative action hiring, the obligation ends once "the proportional black participation is achieved in the entry level firefighter positions". In contrast, ¶ 19-20 of the Decree specifies that one-for-one hiring shall continue until blacks comprise 6.8% of all "uniformed job classifications". A.64. This represents the best long-term goal plaintiffs could achieve. Blacks comprise 6.8% of Des Moines' general population, but only 5.7% of its work force; blacks are only 4.1% of the Des Moines SMSA general population, and even less of the SMSA work force. CJ ¶ 10 provides for continuing jurisdiction until the black percentage of the DMFD work force is "commensurate with the black presence in the work force at large", which suggests Petitioners intended the lower *work force* percentage (5.7% or the lower SMSA percentage) to apply to its ¶ 4 hiring obligation as well. In addition, the CJ hiring mandate would have concluded once the relevant black percentage was achieved "in the entry level firefighter positions", which number

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by the yardstick suggested by Petitioners, the final Decree will result in at least thirteen more black firefighters than under Petitioners' proposal, a result two-and-a-half times more favorable to the plaintiffs' class than the offer. All other elements of the final Decree's remedies, individual and class relief, injunctive relief, and fees, are more favorable as well.[11]

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Footnote continued—

only 144. App. 42. In contrast, the final Decree's 6.8% long-term goal concludes only when 6.8% of all 311 *uniformed* fire department positions are filled. A.51. In sum, the final Consent Decree mandates affirmative action hiring until there are at least 21 black firefighters (.068 x 311), whereas the CJ would only have ensured eight black firefighters (.057 x 144).

Two other features of the final Decree further enhance its affirmative action hiring provisions. The final Decree only counts those who achieve nonprobationary firefighter status as "hires", while the CJ is silent. Finally, in contrast to ¶ 4-5 of the Decree, which extensively summarizes the statistical evidence, the CJ contains no evidentiary basis for a finding of a pattern and practice of discrimination, which is vital to both obtaining court approval of the Decree and to protecting the Decree against collateral attack.

11. Although CJ ¶ 8 provides for individual hiring relief for the same plaintiffs' subclass as does ¶ 21a of the Decree, ¶ 21a also affords those individuals retroactive seniority. Furthermore, ¶ 22 and ¶ 35 of the Decree provide that any dissatisfied class member can opt out of the settlement as of right, in contrast to CJ ¶ 12 which waives all individual claims against Petitioners' 1982 selection process. Finally, ¶ 21b of the Decree provides a nonapplicants class with a right to be considered under the new nondiscriminatory selection process, regardless of age; there is no comparable provision in the CJ.

The CJ contains no injunctive relief at all as to the application-selection process. Paragraph 22 of the Decree mandates Petitioners to continue to use the modified 1982 selection process procedures, qualifications and selection criteria, and ¶ 15 prohibits Petitioners from any modification of the process or selection criteria without approval of Respondents or the court. Paragraph 12 enjoins Petitioners from any use of the personality test as a ranking device and reserves the right to challenge its use even on a pass/fail basis. Paragraph 16 mandates that the application period shall not be shorter than six weeks. Paragraph 2 contains important injunctive protection against obstruction

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Respondents did not reject the September 7, 1983 consent decree tendered to the district court. Except for numerous notices (to both Plaintiffs' class and the various subclasses entitled to relief) written and negotiated thereafter, Petitioners' September 7, 1983 consent decree tender is the final Consent Decree which was jointly proposed to the district court in December 1983. However, in addition to the Consent Decree and attached notices, the parties also submitted to the court a Stipulation of the Parties which became part of the final judgment. *See*, Resp. A.1. Whether the Stipulation be characterized as additional substantive relief, as procedural or prophylactic relief, or an important clarification of certain latent ambiguities in ¶ 19-20 of the Consent Decree, the final judgment was more favorable to Respondents because of it. The internal Plaintiffs' class conflict concerned whether ¶ 19-20 adequately protected against the hiring of less qualified blacks intending to flunk them out during drill school. Had Respondents been unable to obtain the Stipulation, that conflict threatened to result in objections from the NAACP and other class members,[12] which might

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Footnote continued—

of decree enforcement and against retaliation. Although CJ ¶ 1 mandates affirmative action recruitment, it leaves the details to an exhibit which was never provided, A.32; in contrast, a comprehensive affirmative recruitment obligation is mandated by ¶ 17-18 of the Decree.

CJ ¶ 11 provided Plaintiffs with attorney fees "at the hourly rate charged to the NAACP" (which Petitioners knew was zero, as Respondents' counsel's compensation was contingent upon fees being awarded by the court); in contrast, ¶ 32-33 of the Decree provide for payment of all expenses and disbursements and "reasonable attorneys' fees" (at market rates), with provision for fees not only through entry of the Decree but also "for the work done implementing" its remedial provisions.

12. The Consent Decree's primary disincentives against such misconduct are contained in two ¶ 19 provisions. The first man-

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have precluded district court approval of the Consent Decree, and almost certainly would have led to an appeal if approved. Judge Vietor praised Respondents' counsel for their work in speedily and harmoniously resolving the class conflict:

> Lack of plaintiff class unity in this type of civil rights litigation is natural and common, and a fundamental part of the duties of counsel for the plaintiffs is to

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Footnote continued—

dates that the one-for-one hiring relief will continue until the long-term 6.8% goal "has been achieved and maintained for a period of one (1) year"; the second states that "[f]or purposes of determining compliance with the interim and long-term goals, persons who fail to complete probation shall not be counted as having been appointed." Both ensure that *long-term* goal performance will be measured in permanent jobs rather than mere appointments. The Stipulation completes the shield by constructing additional disincentives against any abuse of the *interim* goal.

Stipulation ¶ 3 makes clear that at least 50% of all annual vacancies must be filled by black applicants, but, more importantly, ¶ 4 further requires that blacks constitute at least 50% of "all net appointments made during the year." Net appointments are to be calculated "by deducting from the list of appointments all persons who, for whatever reasons, left the firefighting positions because of failure to complete their probationary year." Paragraph 5 provides "that cumulative black appointments [shall] constitute at least fifty (50) percent of all net appointments at the end of every reporting period during the life of the Consent Decree", making clear that should there be a shortfall of net black appointments one year, compliance with the Decree would not be achieved by appointing on a one-for-one basis the following year. Resp. A.2.

Should a shortfall in cumulative black appointments occur, ¶ 6 requires the City to "make application to the Court for direction before any further vacancies are filled or appointments are made or new selection process is started". The Stipulation imposes an obligation on Petitioners to take affirmative action, if necessary, so that blacks constitute at least fifty percent of those achieving nonprobationary status on an annual basis—and on a cumulative basis—throughout the life of the Decree. Should these *interim* goals not be achieved, ¶ 6 establishes the mechanism by which the court could order compensatory black appointments. Resp. A.3.

work with the class to achieve the unity requisite to a fair conclusion to the case. A.10.

No Rule 68 defense was raised in either court below. "It is only in exceptional cases coming here from the federal courts that questions not presented or passed upon below are reviewed." *Duignan v. United States,* 274 U.S. 195, 200 (1927). No exceptional circumstance exists which warrants allowing Petitioners to raise a Rule 68 issue for the first time before this Court.[13]

At most, Rule 68 would only bar Respondents' recovery of post-offer *traditional* costs (court fees, printing expenses, etc.) and would not affect their recovery of post-offer attorney fees. Judge Vietor's award of attorney's fees was based not only on the fees-shift provisions of Title VII and § 1988, but also on "other applicable civil rights fee-shifting statutes." A.7. Although the district court did not enumerate those other statutes, the Consent Decree does. A.45-A.46. One of the other civil rights fees-shift statutes is the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act"), whose provisions fully and independently authorize the substantive relief incorporated in the Consent Decree.[14]

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13. Assuming *arguendo* that a decision overruling settled Supreme Court precedent might constitute an exceptional circumstance, *Marek* is not such a case. *Marek* did not represent a change in the law so much as a clarification. It did not overrule any prior precedents of this Court. The lower courts were split with regard to the Rule 68 issue resolved in *Marek,* but that is not exceptional. This Court granted certiorari in *Marek* on April 23, 1984, *see* 104 S.Ct. 2149, nearly two-and-a-half months prior to the evidentiary hearing on fees in the instant case on July 6, 1984. The District Court decision in *Marek,* whose rationale this Court followed, came down on September 3, 1982, nearly a year-and-a-half before Respondents filed their application for fees. 547 F.Supp. 542 (N.D.Ill. 1982).

14. 31 U.S.C. § 6716(a) provides in part: "No person in the United States shall be . . . subject to discrimination under,

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The Revenue Sharing Act is an independent source of jurisdiction in this case, as Petitioners acknowledge at page 6 of their Petition. See also, A.46. The Revenue Sharing Act authorizes the district court to "allow a prevailing party (except the United States Government) a reasonable attorney's fee." 31 U.S.C. § 6721(c)(2); *supra* at 1. Rule 68, as interpreted by *Marek,* only impacts on attorneys' fees awards when the underlying fee-shift statute defines "costs" to include attorney's fees. Since the Revenue Sharing Act is an independent basis for the entire fees award in this case, and since it does not define fees "as costs", any Rule 68 sanction in the instant case would have no effect on the district court's attorneys' fees award.

3. Petitioners state that the court of appeals erred in affirming the district court's award of $15,237 in fees to special counsel, Conlin and James, for their prosecution of Respondents' fee application. Again, Petitioners raise a factual issue subject to reversal only for abuse of discretion. The Eighth Circuit properly held that the district court did not abuse its discretion when it concluded the amount of Respondents' fee request was reasonable and that it was appropriate for them to retain counsel to litigate their fee application.

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**Footnote continued—**

a program or activity of a . . . unit of general local government because of race, color . . . when the government receives a payment under this chapter." Section 6721(a) authorizes a private cause of action when, as in the instant case, an administrative complaint has been filed with the Secretary of the Treasury and administrative remedies have been exhausted. The court may grant injunctive relief, including affirmative action hiring relief, attorney's fees, and can order suspension or repayment of Revenue Sharing monies. *Id.* at § 6721(c). *See, United States v. City of Chicago,* 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977).

The law is settled that plaintiffs are entitled to recover attorney's fees for the work done to establish their attorney's fees for work on the merits of the litigation. *E.g., Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982). As noted above, at 10, *Stanford Daily v. Zurcher, supra,* was one of the decisions specifically designated by the Fees Act legislative history as correctly calculating a "reasonable" attorney's fee. *Hensley,* 461 U.S. at 430 n.4. *Zurcher* awarded fees for the legal work done on the fees litigation, holding that to disallow such fees "would allow parties to dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." 64 F.R.D. at 684.

*Hensley* and *Blum* make clear that the burden of proof on attorney's fees claims rests with the plaintiffs. It matters not that additional attorneys were brought in on the fees litigation at the district court, as the work had to be done by someone. *Tasby v. Estes,* 651 F.2d 287, 289 (5th Cir. 1981). Retention of counsel was especially appropriate due to the necessity of testimony by Respondents' counsel, Lovell and Biehler. Petitioners also retained outside counsel to represent them at the fees hearing.

Respondents' initial fees application requested an enhancement of 1.75, which was consistent with existing case law when filed on February 17, 1984. *E.g., Jorstad v. IDS Realty Trust,* 643 F.2d 1305 (8th Cir. 1981) (1.5 enhancement, total fees of $1,019,634); *Rajender v. Univ. of Minnesota,* 546 F. Supp 158 (D. Minn. 1982) (2.0 enhancement, total fees of $1,955,000). On March 21, 1984, this Court decided *Blum v. Stenson,* in which it held that quality enhancements were available only in the "rare" case, 104 S.Ct. at 1548, and left uncertain whether contingency enhancements were available at all. *Id.* at 1550.

As a result of this change in the law, Respondents reduced their requested enhancement to .75. Even *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978), relied upon by Petitioners, recognizes that the fact the original fees request required revision due to new case law in no way implied that the initial request was not filed in good faith. *Id.* at 77 n.3.

The fees claim of James and Conlin was modest, and no claim for work on the fees litigation was made by any of the Respondents' other counsel at the trial level. Respondents were awarded $167,794 in fees for work on the merits, which is nearly 96% of their requested merits lodestar. In light of these results, the district court did not abuse its discretion in awarding $15,237 in fees and $1,869.40 in expenses to James and Conlin.

## CONCLUSION

No substantial issues warranting further briefing or oral argument have been raised by Petitioners. The writ of certiorari should be denied.

Dated: December 13, 1985.

Respectfully submitted,

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# APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**Southern District of Iowa**
**Central Division**

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Civil No. 82-460-D

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DENNIS A. MOORE, et al.,
Plaintiffs,

vs.

CITY OF DES MOINES, IOWA, et al.,
Defendants.

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## STIPULATION OF THE PARTIES

COMES NOW the Plaintiffs, named and class, and the Defendants City of Des Moines, Iowa and the Civil Service Commission of the City of Des Moines, Iowa (hereinafter the City and the Commission) and file with the Court the following STIPULATION OF THE PARTIES concerning the implementation of the Consent Decree:

1) that, as more fully set out in Paragraph 19 of the Consent Decree, the City's interim goal is to fill at least fifty (50) percent of all vacancies for the entry level uniformed position of firefighter with qualified black applicants; and that this filling of all such vacancies with at

least fifty (50) percent qualified black applicants is and shall remain the result intended by plaintiffs and defendants in all hiring actions undertaken pursuant to this Consent Decree for so long as the Court retains jurisdiction in this action;

2) that, as set out in said Paragraph 19, the City shall not, in making its annual compliance report, count any person as appointed who failed to complete probation during the year for which the report is made;

3) that the City's compliance with this interim goal shall be measured as set out in said Paragraph 19 on an annual basis from the date of the Consent Decree by tallying all vacancies filled during the year and ascertaining and reporting whether at least 50% of all such vacancies have been filled by appointment of qualified black applicants;

4) that the measurement of the City's compliance under Paragraph 19 shall be determined from the information contained in such annual report, which shall inform the Court therein of all net appointments made during the year, which shall be ascertained by deducting from the list of appointments all persons who, for whatever reason, left the firefighting positions because of failure to complete their probationary period during the year under review, and reporting which of such appointments were of qualified black candidates and whether fifty (50) percent of the net appointments made during the year were of qualified black candidates;

5) that the intent of the parties is to assure that cumulative black appointments constitute at least fifty (50) percent of all net appointments at the end of every reporting period during the life of the Consent Decree;

6) that, if at the end of such reporting year, for whatever reason, fewer than fifty (50) percent of either all vacancies filled or all net appointments made have been of qualified black candidates, the City shall make application to the Court for direction before any further vacancies are filled or appointments are made or new selection process is started;

7) that, upon the exhaustion of the original and reserve list, and pursuant to paragraph 26 of the Consent Decree, the City shall immediately provide a report to the plaintiffs supplying all information necessary to determine the net cumulative appointments of blacks and non-blacks during the life of the Consent Decree;

8) that, in the event a person leaves drill school or fails otherwise to satisfactorily complete his/her probationary period, the City, in keeping with its practice during the 1982 Selection Process, shall deem that person as not having been appointed and shall utilize the provisions of Paragraph 20(d) in making the next appointment from the sublist or the reserve sublist;

9) that, when any black appointee leaves drill school or fails to otherwise satisfactorily complete the probationary period, the City shall immediately file with the Court a full report of the facts known to the City or its employees which pertain to such action, sufficient to provide to the Court and to Plaintiffs' counsel a full opportunity to review and, if deemed proper, to make appropriate response to such action; and

10) that, to the extent the parties differ as to the interpretation of the language and/or intent of the Consent Decree, as herein clarified, each such difference shall be presented to and resolved by the Court before implementa-

tion of such interpretation or as soon as such difference is known, whichever is earlier.

/s/ Thomas I. Atkins
Thomas I. Atkins
General Counsel of the NAACP
ATTORNEY FOR PLAINTIFF NAACP

/s/ Russell E. Lovell II
Russell E. Lovell II
/s/ Gregory L. Biehler
Gregory L. Biehler
/s/ Robert A. Wright, Sr.
Robert A. Wright
ATTORNEYS FOR PLAINTIFFS

/s/ Philip T. Riley
Philip T. Riley
Corporation Counsel
/s/ Nelda Barrow Mickle
Nelda Barrow Mickle
City Solicitor
ATTORNEYS FOR DEFENDANTS